policies, acts and practices of that corporation is not sufficient grounds for concluding that it is no longer necessary to hold him as a respondent in order to serve this purpose.

Petitioners having failed to show that changed conditions of fact or law require that the order be set aside as to respondent Ira Rubin, or that the public interest so requires, as provided by Section 3.72(b)(2) of the Rules of Practice:

It is ordered, That petitioners' request that the order to cease and desist be set aside as to Ira Rubin in his individual capacity be, and it hereby is, denied.

CRUSH INTERNATIONAL LIMITED, ET AL. DOCKET 8853
DR. PEPPER COMPANY DOCKET 8854
THE COCA-COLA COMPANY, ET AL. DOCKET 8855
PEPSICO, INC. DOCKET 8856
THE SEVEN-UP COMPANY DOCKET 8857
NATIONAL INDUSTRIES INC., ET AL. DOCKET 8859

Order, March 23, 1972

Order denying respondents' motions to dismiss complaints for failure to join respondents' bottlers as indispensible parties.

ORDER RULING ON MOTIONS TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES

This matter is before the Commission upon requests for permission to file interlocutory appeals by the respondents in Docket Nos. 8853–8857 and Docket No. 8859, upon complaint counsel's response thereto, filed February 17, 1972, and upon respondent Dr. Pepper Company's response to complaint counsel's reply, filed February 29, 1972.[1] Al-

[1] The motions are as follows: Crush International Limited, Docket No. 8853—application for leave to file an interlocutory appeal or to treat motions as certified filed February 4, 1972; Dr. Pepper Company, Docket No. 8854—request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to dismiss the complaint for failure to join indispensable parties and for a stay of proceedings, and request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to amend the complaint to join the Dr. Pepper Company bottlers as co-respondents filed February 4, 1972. The Coca-Cola Company, Docket No. 8855—application (I) for leave to file interlocutory appeals and (II) to treat motions to dismiss as certified filed January 18, 1972; Pepsico, Inc., Docket No. 8856—application for leave to file interlocutory appeal or to treat motions as certified filed January 31, 1972; The Seven-Up Company, Docket No. 8857—application for permission to file (1) appeal for de novo consideration of respondent's motion to dismiss, or (2) interlocutory appeal filed January 31, 1972; National Industries, Inc., Docket No. 8859—respondents' request for permission to file interlocutory appeal from the hearing examiner's order denying motion to dismiss the complaint for failure to join indispensable parties filed February 3, 1972.

though the motions are not identically styled and vary somewhat in the specific relief sought, they nevertheless involve the same question and will therefore be considered together.

The question arises as a result of complaints issued by the Commission against several soft drink companies challenging the legality of respondents' contracts with their respective bottlers. Respondents take the position that their bottlers are indispensable parties to these proceedings and that absent their joinder the complaints should be dismissed. Motions to this effect were denied by the examiner and these requests for permission to appeal followed. Before considering these requests we will deal with the procedural issues of the examiner's authority to rule on a motion to amend the complaint by the addition of parties to Commission proceedings and his authority to rule on motions to dismiss.

I

The Commission has consistently taken the position that the examiner has no authority to amend a complaint by the addition or deletion of parties except to the extent that his ruling deals with matters of procedure rather than substance such as the deletion of an individual respondent who has deceased or the substitution of respondents improperly named, etc. The same applies to motions to dismiss because both involve the "reason to believe" concept of Section 5 which only the Commission itself can express. Both issues were involved in the *Suburban Propane Gas Corp.* case, Docket No. 8672, Order Ruling on Interlocutory Appeals, May 25, 1967, CCH Trade Reg. Rep. [1967–1970 Transfer Binder] ¶ 17,965 [71 F.T.C. 1695]. On the issue to amend the complaint by a joinder of an additional party we there held that it should have been certified to the Commission. As to the motion to dismiss we stated as follows:

> The examiner recognized that the question involved the administrative discretion in issuing a complaint and that it presented an issue on which he had no authority to rule. Nonetheless, he denied the motion. The matter should have been certified to the Commission with the examiner's recommendation. Section 3.6(a), Commission's Rules of Practice; Drug Research Corp., Docket No. 7179 (October 3, 1962). [Footnote omitted] Respondent, however, has not been prejudiced, since the matter is now before the Commission for *de novo* consideration and determination, at 20,337.

The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, *The Drive-X Company, Inc.*, Docket No. 8615, Order

Denying Application for Leave to File Interlocutory Appeal or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so intertwined with the question of amending the complaint by the addition of parties that both should have been certified to the Commission.

Although the matter has not been so certified, we are not precluded from considering it, since it is before us upon respondents' request for leave to file interlocutory appeals. A similar procedure was followed in *Maremont Corp.*, Docket No. 8763, Order Denying Respondent's Request to File Interlocutory Appeal and Motion to Dismiss the Complaint or Stay Proceedings, October 3, 1968, CCH Trade Reg. Rep. [1967–1970 Transfer Binder] ¶ 18,542 [74 F.T.C. 1614]. There we held as follows:

> Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964). The hearing examiner should properly have certified this part of respondent's motion to the Commission for the Commission's determination and action. Nevertheless, in view of respondent's application for permission to file an interlocutory appeal, the matter is now before the Commission in the same posture as it would have been had the examiner certified it. Accordingly, while our holding is that the hearing examiner erred in failing to certify the motion, this in the circumstances was not to respondent's prejudice and the motion will now be treated as though it has been properly certified. at 20,889.

We will follow this procedure in the instant proceeding. At the same time we will consider the examiner's ruling as his recommendation to the Commission for the disposition of this matter.

II

The question presented for our decision is whether respondents' bottlers who are parties to the contract being challenged by the complaint are indispensable parties to this proceeding. In essence the position urged upon us by the respondents is that an adjudication of these contracts involves substantial rights of the bottlers who, over the years, have expended goodly sums of money in the development of their business operations in reliance on the terms of their

contracts and hence due process requires that they be made a party so that they may be bound by the outcome of this proceeding as well as protect their interests. Respondents are also concerned that the failure of joinder may subject respondents to multiple litigation with their bottlers and result in inconsistent future adjudications. Absent a joinder of the bottlers, respondents ask that the complaints be dismissed.

The examiner's ruling complained of contains the following statements:

> It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondents have with their bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondents' trademarked products, it would be without recourse to sue the respondents for damages or for injunctive relief requiring them to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.
>
> As a practical matter, however, it is not feasible to join all of the respondents' bottlers as parties to this proceeding. In the first place, the large number of them (1186) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce thereby depriving the Commission of jurisdiction over such bottlers. Order Denying Motion to Dismiss the Complaint for Nonjoinder of Indispensable Parties, January 7, 1972, page 3–4.

The examiner was guided in his decision by Rule 19 of the Federal Rules of Civil Procedure and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968) a case interpreting the requirements of Rule 19.

Traditionally, of course, antitrust proceedings and decrees have taken little, if any, notice of third parties to any contract held to be in contravention of one of the antitrust laws perhaps because the vindication of public rights, even though they run counter to contractual rights between defendants and third parties, may be accomplished without joining these third parties. This reasoning is advanced by Professor Moore in 3A MOORE's FEDERAL PRACTICE, Section 19.10 at 2344. Respondents invite attention to two 1921 proceedings involving this Commission which allegedly support the proposition that the complaint should be dismissed for failure to join indispensable parties. The first is *Fruit Growers' Express Inc.*, v. *F.T.C.*, 274 F.205 (7th Cir. 1921) in which the court vacated a Commission cease and desist order on the ground that the Commission was without jurisdiction because the facts involved common carriers who are within the sole jurisdiction of the Interstate Commerce Commission. The second is *Sinclair Refining Co.*, v. *F.T.C.*, 276 F.686

(7th Cir. 1921), in which the failure to join what the reviewing court considered to be an indispensable party was advanced as one of the reasons for setting aside an order to cease and desist *after* the court had decided that no violation had been shown. Neither case can be considered a viable precedent for the proposition advanced here. Moreover, a subsequent decision by the same court specifically upheld the Commision's view and with specific reference to these two decisions *Automatic Canteen* v. *F.T.C.*, 194 F.2d 433 (7th Cir. 1952), *rev'd in part on other grounds*, 346 U.S. 61 (1953). Finally, the courts in a procession of decisions have failed to join or otherwise consider indispensable third parties to a contract the legality of which was being challenged under the antitrust laws. See, *United Shoe Machinery Corp.* v. *U.S.*, 258 U.S. 451 (1922); *U.S.* v. *Paramount Famous Lacky Corp.*, 282 U.S. 30 (1930); *Interstate Circuit, Inc.*, v. *U.S.*, 306 U.S. 208 (1939); *U.S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *U.S.* v. *National Lead Co.*, 332 U.S. 319 (1947); *U.S.* v. *Schine Theatres, Inc.*, 334 U.S. 110 (1948); and *U.S.* v. *International Boxing Club of New York, Inc.*, 171 F. Supp. 841 (S.D.N.Y. 1957), *aff'd* 348 U.S. 242 (1959). The last time this Commission had to consider this question was in *L. G. Balfour Co.*, Docket No. 8435, July 29, 1968, CCH Trade Reg. Rep. [1967–1970 Transfer Binder] ¶ 19,485 [74 F.T.C. 345] in which it came to the same conclusion. In *Eastman Kodak Co.*, Docket No. 6040, similar arguments were advanced with respect to the challenged resale price maintenance contracts Kodak had with over 6,000 retailers. What we said there is pertinent here:

> It is true that if an order prohibiting respondent from fixing and maintaining resale prices in accordance with its agreements with these dealers is issued, it would affect their contractual rights. However, no such prohibition will be issued herein unless the Commission determines that these agreements are in unreasonable restraint of trade and should not be continued. The courts have regularly struck down systems deemed violative of the antitrust laws even though such systems included leases, licenses and other forms of agreements where the other parties thereto were not before the court and where the enjoined covenants were clearly of benefit to said other parties. Order Disposing of Motion to Strike and Respondents' Motion to Dismiss, September 25, 1953.

It is well established, therefore, that third parties to a contract the legality of which is being challenged under the antitrust laws need not be joined in a suit against the first party and are thus not considered indispensable parties. In *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940) the court observed that "in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender. Such orders have never been challenged be-

cause the holders of the contracts were not made parties." at 366. In light of the foregoing we believe respondents' claim that due process requires the joinder of the bottlers as indispensable parties and absent that, a dismissal of the complaints, to be without merit.

Respondents also assert that the failure to join the bottlers may subject respondents to the risks of multiple litigation and inconsistent future adjudications. Our own understanding of the applicable legal principles leads us to conclude that such an eventuality is highly unlikely. A contract which has been declared illegal cannot be enforced by either party.

> A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value. * * * *Restatement of Contracts*, Section 598 (1932)

Similarly, supervening illegality renders a contract unenforceable even if it was legal when entered into *Restatement of Contracts*, Section 548. In this regard, administrative proceedings are considered to have the same effect as do statutory provisions.

> Clearly prevention by an executive and administrative order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual. 6 *Williston on Contracts*, Section 193 (Rev. Ed., 1938).

We turn now to the question of whether, by using Rule 19 of the Federal Rules of Civil Procedure, a different result would be dictated. The Federal Rules of Civil Procedure are not, of course, applicable to administrative agency proceedings which are governed by their own rules of practice. Nevertheless, they can provide an analytical framework for the disposition of related issues. Rule 19(a) provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

As to (1), it is clear that depending on the outcome, complete relief can be acorded in this proceeding without joining the bottlers. Should the allegations of the complaint be upheld, the relief sought by the order, the termination of the exclusive territorial contracts, can be accomplished by an order to cease and desist naming the

presently named respondents. The second part of Rule 19(a) is divided into two parts—an unprotected interest and a substantial risk of incurring inconsistent obligations in relation to that interest. If, however, that interest is not a legally protected one, as for example rights pursuant to a contract declared illegal under the antitrust laws, it cannot serve as a basis for a joinder of allegedly indispensable parties. The fact that a contract may have previously not been illegal does not alter this result. The Commission was created for, among others, the purpose of prohibiting hitherto unchallenged trade restraints. *F.T.C.* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 1972. As for the risk of incurring inconsistent obligations due to the failure to join the bottlers, Rule 19 requires that risk to be substantial before it will be considered as a reason for a joinder of additional parties. As we have mentioned above, that risk cannot be considered substantial. Our review of the applicable case law convinces us that the bottlers are not indispensable parties within the meaning of Rule 19. See, *e.g.*, *Bennie* v. *Pastor*, 393 F.2d 1 (10th Cir. 1968), citing *Shields* v. *Barrow*, 58 U.S. (17 How.) 129 (1854) and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968); *Chiodo* v. *General Waterworks Corp.*, 380 F.2d 860 (10th Cir. 1967), *cert. denied*, 389 U.S. 1004; *Stevens* v. *Loomis*, 334 F.2d 775 (5th Cir. 1964).

III

One final aspect of this matter need be considered. In its request, the Coca-Cola Company points to *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F.796 (D. Del 1920) as supportive of its position. There, in a dispute over the contract, the court found these exclusive territorial contracts to be lawful and as not "having an effect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly, nor do I find anything therein that may be said to be in unreasonable restraint of trade." at 814. We have carefully reviewed that decision and conclude that it does not support respondent Coca-Cola's position.

IV

A number of the respondents have requested the opportunity for oral argument. Under the circumstances, we do not believe that an oral argument would serve any useful purpose. Accordingly,

It is ordered, That the motions to dismiss for failure to join indispensable parties be, and they hereby are, denied.

UNITED BRANDS COMPANY

Docket 8835. Order, March 29, 1972

Order authorizing hearing examiner to issue subpoenas *ad testificandum* to federal, state and local officials and employees.

ORDER AUTHORIZING ISSUANCE OF SUBPOENAS

The hearing examiner on March 1, 1972 certified complaint counsel's application for the issuance of subpoenas *ad testificandum* to government officers and employees therein identified, with the recommendation that the application be granted.

The Commission has considered the matter and is of the view that there may be alternative methods for receiving evidence needed in this proceeding in lieu of issuing the subpoenas requested by complaint counsel. The Commission, although it will hereby authorize the subpoenas, suggests that the hearing examiner first reconsider his rulings of October 13 and October 31, 1971 and make a new determination on the admissibility of the evidence in issue in the light of the possibility of alternatives. Accordingly,

It is ordered, That the hearing examiner be, and he hereby is, authorized to issue subpoenas *ad testificandum* to the federal, state and local officials and employees named and identified in complaint counsel's application filed February 28, 1972.

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

Docket 8827. Order, April 6, 1972

Order authorizing hearing examiner to issue subpoenas *ad testificandum* to officials or employees of governmental agencies.

ORDER AUTHORIZING ISSUANCE OF SUBPOENAS

Upon consideration of the hearing examiner's certification filed April 3, 1972 of complaint counsel's motion for the issuance of subpoenas *ad testificandum* to government officials or employees filed March 31, 1972, in which certification the hearing examiner recommends the motion be granted:

It is ordered, That the hearing examiner be, and he hereby is, authorized to issue subpoenas *ad testificandum* to the officials or employees of governmental agencies identified in complaint counsel's motion filed March 31, 1972.

AMERICAN ALUMINUM CORPORATION, ET AL.

Docket 8865. Order, April 7, 1972

Order denying respondents' appeal from the hearing examiner's order denying request for extension of time. The order further denies respondents' appeal from the hearing examiner's order denying their request for issuance of subpoenas *duces tecum.*

ORDER DENYING APPEAL AND REQUEST FOR PERMISSION TO FILE APPEAL

This matter is before the Commission upon the filing by respondents on March 21, 1972, of a document entitled "Appeal From Order Of Hearing Examiner Denying Request For Issuance Of Subpoenas Duces Tecum And For Adjournment Of Hearing," which respondents state is made pursuant to Section 3.35(b) of the Commission's Rules of Practice; and upon the answer of complaint counsel filed March 27, 1972, in opposition thereto.

There are two issues involved here: The first concerns the examiner's denial of their request for a thirty-day extension of time for preparation for trial. Under the Commission's applicable Rules of Practice an appeal from a ruling of this nature must be made pursuant to Section 3.23 of such rules, which requires that permission to file an interlocutory appeal must first be obtained from the Commision. This rule further states that permission will not be granted except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before the conclusion of the hearing is essential to serve the interests of justice. The Commission will treat respondents' request on this issue as a request for permission to file interlocutory appeal. No showing of any kind has been made to justify the granting of such permission. Furthermore, this is purely a procedural ruling. The Commission will ordinarily not interfere with the broad discretion of the hearing examiner on such a ruling and no reason has been shown why it should do so in this case. The request will be denied.

The other issue concerns the hearing examiner's denial of respondents' request for subpoenas *duces tecum* to be issued to five companies which apparently are competitors, seeking copies of advertisements and other documents and information. Respondents have made no showing to support their appeal on this issue, as required by Section 3.35(b) of the Commission's Rules of Practice. Moreover, this is a matter of discovery and rulings thereon are ordinarily left to the

sound discretion of the hearing examiner. Respondents here made no showing of error. Thus, the appeal on this issue likewise will be denied. Accordingly,

It is ordered, That respondents' appeal from the hearing examiner's order of March 13, 1972, to the extent such order denies a request for an extension of time to comply with the pretrial order, treated herein as a request for permission to file an interlocutory appeal, be, and it hereby is, denied.

It is further ordered, That respondents' appeal from the hearing examiner's order of March 13, 1972, to the extent such order denies respondents' request for the issuance of subpoenas *duces tecum* be, and it hereby is, denied.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, April 20, 1972

Order placing on the Commission's docket for review the hearing examiner's order authorizing subpoenas to Commission employees.

ORDER PLACING HEARING EXAMINER'S ORDER AUTHORIZING SUBPOENAS TO COMMISSION EMPLOYEES ON THE COMMISSION'S DOCKET FOR REVIEW

In its own motion, the Commission, pursuant to Section 3.36(e) of the Commission's Rules of Practice, has determined to place on its docket for review the hearing examiner's order of March 6, 1972, granting respondents' application for subpoenas directed to the following Commission employees: Charles A. Tobin, Secretary; John R. Ferguson, Assistant General Counsel; and Charles F. Simon, Attorney. The Commission has further determined that the filing of briefs is not appropriate; therefore,

It is ordered, That the hearing examiner's order of March 6, 1972 be, and it hereby is, placed on the Commission's docket for review; and

The scope of the review is limited to respondents' motion for depositions and for subpoenas to Commission employees, the hearing examiner's order authorizing the requested subpoenas and the subpoenas directed to Messrs. Tobin, Ferguson and Simon; and the issues which will be considered are:

1. Whether the subpoenas directed to Messrs. Tobin and Ferguson were properly granted in light of the Commission's opinion of December 6, 1971 holding that respondents' Freedom of Information request was to be treated as an administrative matter separate from the instant adjudication; and in light of the Commission's decision in this matter of October 29, 1971;

2. Whether respondents made the required showing of relevancy under Section 3.36 of the Commission's Rules of Practice to warrant issuance of subpoenas to Messrs. Tobin and Ferguson; and

3. Whether the scope of the subpoena directed to Mr. Simon should be limited to exclude testimony concerning Advisory Opinion 128 in light of the Commission's decision in this matter of October 29, 1971.

Chairman Kirkpatrick not participating.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, April 20, 1972

Order denying respondents' interlocutory appeal from hearing examiner's denial of their motion to compel testimony or in the alternative, for an order striking certain allegations from the complaint.

ORDER DENYING INTERLOCUTORY APPEAL

Respondents the Hearst Corporation (Hearst) and Periodical Publishers' Service Bureau, Inc., (Periodical) have filed an interlocutory appeal from the hearing examiner's November 1, 1971, order denying Hearst's and Periodical's Motion to Compel Testimony, or Alternatively, for an Order Striking Certain Allegations from the Complaint. This appeal arises from an attempt by these two respondents to take the depositions of the president and vice president of a third respondent, International Magazine Service of the Mid-Atlantic (IMS) which is a franchisee of Periodical. Several allegations in the complaint seek to hold appellants responsible for certain deceptive practices engaged in by IMS, and appellants claim it is necessary to take the depositions of these IMS officials in order to effectively prepare to cross-examine certain of complaint counsel's consumer witnesses who dealt with employees of IMS. The two officials have refused to testify on Fifth Amendment grounds.[1] On September 23, 1971, Hearst and Periodical filed a motion with the hearing examiner to compel their testimony or alternatively for an order

[1] Upon Hearst's and Periodical's application, subpoenas directed to the IMS officials were first issued by the hearing examiner in May 1971, but the officials refused to testify at the scheduled depositions. Thereafter, Hearst and Periodical requested that the examiner certify to the Commission their request that the Commission issue an immunity order under the Crime Control Act, 18 U.S.C. § 6002. The Commission sought the approval of the Attorney General for the issuance of such an order which was denied, and the Commission remanded the matter to the hearing examiner who once more ordered the discovery depositions of the two officials. They again asserted their privilege against self-incrimination, whereupon Hearts and Periodical filed the motion which is the subject of this appeal.

striking the allegations of the complaint charging Hearst and Periodical with responsibility for the acts of IMS. This motion also requested that the examiner certify the motion to the Commission recommending that it commence enforcement proceedings. The examiner's denial of this motion is the subject of this appeal.

At the outset, we must consider whether respondents have made the necessary showing that the examiner's ruling involves "substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice."[2] We are of the opinion that respondents have not made the necessary showing to warrant an interlocutory appeal in this instance.

In our view, respondents' request is premature. The hearings involving the IMS phase of the proceedings have been postponed indefinitely due to a criminal indictment against IMS and three of its officers which involves some of the same acts and practices alleged in the Commission's complaint. In addition, we do not believe respondents' claim that they will be denied effective cross-examination of certain consumer witnesses can be determined until these witnesses have testified. Also, the examiner has given respondents an opportunity to raise the issue again after hearings involving IMS are subsequently rescheduled. Furthermore, if respondents are found to have been prejudiced in their cross-examination of consumer witnesses, there will be ample opportunity to correct such prejudice at the conclusion of the hearing.[3]

Consequently, at this stage in the proceeding, it cannot be said that the hearing examiner's ruling denies Hearst and Periodical substantial rights or that his ruling will materially affect the final outcome of the case. A determination of the correctness of the ruling at this time is in no way essential to the interests of justice, and in fact, the correctness of the ruling cannot even be accurately or adequately determined at this time.

Accordingly, the Commission having concluded that the respondents Hearst and Periodical have failed to make the necessary showing to warrant an interlocutory appeal under the Commission's Rules of Practice,

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[2] This showing is required to justify an interlocutory appeal under both Sections 3.23 and 3.35(b) of the Commission's Rules of Practice. While we believe that respondents were in error in appealing here under Section 3.35(b) because the examiner has not in fact quashed the subpoenas at issue to give rise to an appeal under this rule, their error does not affect the outcome of this appeal since both rules require the same showing.

[3] For example, the testimony of the consumer witnesses might be stricken, or the allegations in the complaint seeking to hold Hearst and Periodical responsible for IMS' acts might be stricken at that time.

It is ordered, That the respondents' appeal be, and it hereby is, denied.

Chairman Kirkpatrick not participating.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order, April 28, 1972

Order denying request for review of hearing examiner's adverse rulings on a request for an extension of time, and for oral depositions and subpoenas *duces tecum*.

ORDER DENYING REQUEST FOR REVIEW OF HEARING EXAMINER'S RULINGS AND REQUEST TO RULE DIRECTLY ON MOTION FOR EXTENSION OF TIME

This matter is before the Commission upon the filing by respondent of two documents, the first entitled "Appeal From Hearing Examiner's Denial Of Request For Extension Of Time And Denial Of Application For Oral Depositions And Subpoenas Duces Tecum," filed April 20, 1972; and the other entitled "Motion For Extension Of Time In Which To Respond To Summary Judgment Motion," filed April 24, 1972.

On the first filing, termed an "appeal," the Commission has determined that respondent has not complied with the provisions of Commission Rule Section 3.23, governing interlocutory appeals, published in the Federal Register March 17, 1972 (Volume 37, No. 53, page 5608), and effective fifteen (15) days thereafter. There has been no determination by the hearing examiner of justification in accordance with Paragraph (b) of Section 3.23, nor has respondent shown that the rulings complained of fall within any of the four categories set out in Paragraph (a) of such rule.

Thus, respondent has not justified its request for a review of the hearing examiner's rulings under the Commission's Rules of Practice.

The Commission has further determined that respondent's other filing, which is a direct request to the Commission for an extension of time pursuant to Section 3.22(d) of the Commission's Rules of Practice, is inappropriate in the circumstances. Paragraph (d) of Section 3.22 is intended to give the hearing examiner or the Commission discretion to waive the requirements of Paragraph (c) of that section in the case of motions for extension of time, permitting such motions to be ruled on *ex parte*. Furthermore, Paragraph (d) must be read in the light of Paragraph (a) of Section 3.22, which provides